

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DALE R. PERRY and ORVILLE L.
MOE,

Defendants.

NO. CR-06-0098-EFS

**ORDER RULING ON MOTIONS FROM
THE HEARING OF FEBRUARY 22,
2007**

On February 22, 2007, a hearing was held in the above-captioned matter. Defendant Dale Perry was present represented by Amy Rubin and Defendant Orville Moe was present represented by Mark Vovos. Thomas Rice appeared on behalf of the Government. The Court heard argument on the following motions: Defendant Moe's Motion for an Order Declaring 18 U.S.C. § 666 Unconstitutional for Vagueness (Ct. Rec. 65), Defendant Moe's Motion for Change of Venue and Transfer of Case (Ct. Rec. 62), Defendant Moe's Motion *in Limine* (Ct. Rec. 68), Defendant Moe's Second Motion for Leave to File Additional Motions (Ct. Rec. 69), Defendant Perry's Motion to Sever Counts (Ct. Rec. 73), and Defendant Perry's Motion to Dismiss (Ct. Rec. 70). After reviewing submitted material and

1 relevant authority and hearing oral argument the Court was fully
2 informed. This Order serves to memorialize and supplement the Court's
3 oral rulings.

4 **I. Motion for an Order Declaring 18 U.S.C. § 666 Unconstitutional**

5 Defendant Moe argues that 18 U.S.C. § 666 is unconstitutionally
6 vague facially and as applied, and also argues that due to the
7 possibility of multiple interpretations, the rule of lenity should apply.
8 The Government contends that Defendant has not established the criteria
9 necessary to prove that the statute is facially unconstitutional, and
10 asserts that an as applied challenge is premature given the early stage
11 of discovery. The government argues further that because the statute is
12 not truly ambiguous there is no reason to apply the rule of lenity.

13 A. Facial Challenge

14 A criminal statute can be ruled unconstitutionally vague for either
15 one of two reasons: it fails to give notice that will enable ordinary
16 people to understand what conduct is prohibited, or it authorizes or
17 encourages arbitrary and discriminatory enforcement. *City of Chicago v.*
18 *Morales*, 527 U.S. 41, 56 (1999). Defendant Moe does not argue that any
19 specific provision of the statute is unclear, rather, Defendant argues
20 "[t]he problem with 18 U.S.C. § 666 is that it does not reasonably and
21 clearly set forth when federal funds are going to be considered by the
22 Government, law enforcement, or the courts as worthy of prosecution under
23 § 666." (Ct. Rec. 88 p. 4.) Defendant's argument is that the statute
24 is facially unconstitutionally vague because a Defendant does not know
25 when a sufficient nexus between federal funds and criminal activity
26 exists for a suspect to be charged.

1 Despite Defendant's concern, the Supreme Court has recently upheld
2 the validity of 18 U.S.C. § 666 regardless of whether a nexus is
3 demonstrated between criminal activity and federal funds. *Sabri v.*
4 *United States*, 541 U.S. 600 (2004). The defendant's argument in *Sabri*
5 was that 18 U.S.C. § 666 "can never be applied constitutionally because
6 it fails to require proof of any connection between a bribe or kickback
7 and federal money." 541 U.S. at 604. In response to that argument the
8 Court held

9 [w]e can readily dispose of this position that, to qualify as
10 a valid exercise of Article I power, the statute must require
11 proof of connection with federal money as an element of the
12 offense. We simply do not presume the unconstitutionality of
13 federal criminal statutes lacking explicit provision of a
14 jurisdictional hook . . .
15 *Id.* at 605. The Court goes on to say that Congress has a legitimate
16 interest in ensuring that entities that receive federal funding do not
17 suffer from corruption and graft, noting that "money can be drained off
18 here because a federal grant is pouring in there." *Id.* at 606. The
19 essential holding of the Court is that 18 U.S.C. § 666 does not require
20 prosecutors to demonstrate a nexus between the receipt of federal funds
21 and the criminal activity. Therefore, anytime the entity receives
22 \$10,000 of federal benefit in a year, regardless of any connection
23 between the federal benefit and the graft, individuals should be on
24 notice of the possibility of prosecution.

25 B. As Applied Challenge

26 While Defendant Perry correctly points out that prior application
of the law was inconsistent due to a circuit split regarding the nexus
requirement, such inconsistency does not equate to unconstitutionality

1 based on arbitrary enforcement. Further, the inconsistent application
2 has been diminished by the Supreme Court ruling, addressed above,
3 resolving the circuit split. Defendant Moe attempts to distinguish *Sabri*
4 from the instant case by arguing that in the instant case there is no
5 connection between the federal funding and the alleged corruption;
6 however, the Supreme Court's explicit holding in *Sabri* was that "[i]t is
7 certainly enough that the statutes condition the offense on a threshold
8 amount of federal dollars defining the federal interest." 541 U.S. at
9 606. What the statute plainly requires is that the organization at issue
10 receive benefits in excess of \$10,000 in federal funds in any one year
11 period, and that the accused be found to have embezzled, stolen, obtained
12 by fraud, or knowingly convert property that is valued at over \$5000 and
13 is owned or under the control of the organization at issue. 18 U.S.C.
14 § 666. Neither of these requirements is ambiguous or vague.

15 C. Due Process and Equal Protection and The Rule of Lenity

16 Defendant argues 18 U.S.C. § 666 violates the Due Process clause of
17 the Fifth Amendment, and the Equal Protection clause as incorporated in
18 the Due Process clause by the Supreme Court's holding in *Bolling v.*
19 *Sharpe*, 347 U.S. 497 (1954). Defendant's arguments are premised on his
20 complaints of vagueness as addressed above and fail for the same reasons.

21 Defendant's lenity argument requires the same foundation. As the
22 Court finds the statute not to be ambiguous or vague, there is no need
23 to decipher between multiple possible interpretations in order to apply
24 the most lenient. The statute is clear on its face and should be applied
25 according to its meaning. Therefore, Defendant's motion to declare 18
26 U.S.C. § 666 unconstitutional is denied.

1 Defendant Perry acknowledged that his Motion to Dismiss was based
2 on similar arguments to those raised by Defendant Moe's challenge to the
3 constitutionality of 18 U.S.C. § 666. Therefore, Defendant Perry's
4 Motion to Dismiss is denied.

5 **II. Motion to Change Venue**

6 Defendant requests a change of venue, to Richland, Washington, based
7 on the presumed prejudice of jurors in the Spokane area. Defendant
8 produced 36 articles that appeared in the Spokesman Review. The
9 Government objects to Defendant's request arguing prejudice is only
10 presumed in extreme cases in which the community has been saturated with
11 prejudicial and inflammatory media publicity.

12 "Due process requires that the accused receive a trial by an
13 impartial jury free from outside influence." *Sheppard v. Maxwell*, 384
14 U.S. 333, 362 (1966). A defendant can contest the impartiality of a jury
15 as either actually prejudiced, or presumably prejudiced. *Ainsworth v.*
16 *Calderon*, 138 F.3d 787, 795 (9th Cir. 1998). Here, Defendant is
17 asserting the presumed prejudice of the jury.

18 The factors to be considered when determining whether a jury is
19 presumed prejudiced are: (1) whether there has been a barrage of
20 inflammatory publicity immediately prior to trial amounting to a huge
21 wave of public passion, (2) whether the media accounts were primarily
22 factual, and (3) whether media accounts contained inflammatory
23 prejudicial information that was not admissible at trial. *Id.* Defendant
24 has produced 36 articles dating from October 2003 to December 2006, which
25 Defendant asserts contain prejudicial and inflammatory characterizations
26 of Defendant, including editorials and parodies. While Defendant has

1 demonstrated numerous negative characterizations of Defendant in the
2 Spokane press, Defendant has not demonstrated the level of saturation
3 necessary to make it impossible to seat an impartial jury. *Daniels v.*
4 *Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005).

5 Defendant has not made an adequate showing that an impartial jury
6 cannot be impaneled; therefore, Defendant's motion to change venue is
7 denied with leave to renew.

8 **III. Motion to Sever Counts**

9 Defendant Perry's motion to sever counts is based on his contention
10 that Federal Rule of Evidence 404(b) would prevent introduction of
11 evidence regarding counts 1 and 2, to be admitted at a trial for counts
12 3 and 4, and thus will prejudice the jury. The Government responds by
13 arguing first that Defendant has failed to show the level of prejudice
14 required to overcome the benefit of judicial economy gained by conducting
15 a single trial, and second that evidence of the prior two counts would
16 be admitted at a trial on the latter two counts.

17 Here, evidence regarding counts 1 and 2 would be admissible in a
18 trial on counts 3 and 4 pursuant to the terms of rule 404(b) and the
19 Ninth Circuit's interpretation of that rule. Rule 404(b) states that
20 evidence of other crimes may "be admissible for other purposes, such as
21 proof of motive, opportunity, intent, preparation, plan, knowledge . .
22 ." FED. R. EVID. 404(b). The Government has indicated its intent to show
23 that during the time in which the events at issue took place, Mr. Perry's
24 actions were based on his dire financial situation, and thus he had a
25 common motive with regard to all four counts. Evidence regarding counts
26 1 and 2 may also be admissible with regard to opportunity and intent.

1 As the evidence would be admissible in a trial on counts 3 and 4,
2 Defendant will not suffer prejudice due to the joinder of the counts;
3 therefore, Defendant's motion to sever counts is denied.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendant Moe's Motion for an Order Declaring 18 U.S.C. § 666
6 Unconstitutional for Vagueness (**Ct. Rec. 65**) is **DENIED**.

7 2. Defendant Moe's Motion for Change of Venue and Transfer of Case
8 (**Ct. Rec. 62**) is **DENIED WITH LEAVE TO RENEW**.

9 3. Defendant Moe's Motion *in Limine* (**Ct. Rec. 68**) is **GRANTED IN PART**
10 (the Assistant United States Attorney and his witnesses shall not refer
11 to the following issues without first obtaining permission of the Court
12 outside the presence of the jury: uncharged alleged offenses, alleged co-
13 conspirator's statements made after the conspiracy, irrelevant seized
14 items, opinion evidence without foundation, references to criminal
15 convictions of Defendants, undisclosed 404(b) evidence, plea bargaining
16 endeavors, the terms of attorney employment, evidence not disclosed
17 pursuant to Defendants' discovery requests, the filing of pre-trial
18 motions, references to drug use, negative characterizations of
19 Defendants, perjured testimony, guilty pleas of co-conspirators,
20 characterization of Defendants' testimony as lies, denigration of defense
21 counsel, exploitation of prosecutorial prestige, cooperation agreements
22 with witnesses, misrepresentations of the record, and evidence concerning
23 the lawsuit involving Washington Motorsports Limited) and **DENIED IN PART**
24 (Defendant's requests with regard to "misleading" evidence, the
25 consequences of the jury's verdict, and the use of secondary evidence are
26

1 too vague and denied as such) and **DENIED IN PART WITH THE RIGHT TO RENEW**
2 (the remainder of Defendant's requests).

3 4. Defendant Moe's Second Motion for Leave to File Additional
4 Motions (**Ct. Rec. 69**) is **DENIED AS MOOT** (additional motions shall be
5 filed in compliance with the Order of the Court dated January 24, 2007
6 (Ct. Rec. 81)).

7 5. Defendant Perry's Motion to Sever Counts (**Ct. Rec. 73**) is **DENIED**.

8 6. Defendant Perry's Motion to Dismiss (**Ct. Rec. 70**) is **DENIED**.

9 **IT IS SO ORDERED.** The District Court Executive is directed to enter
10 this Order and to provide copies to all counsel, the U.S. Probation
11 Office, the U.S. Marshal, and the Jury Administrator.

12 **DATED** this 27th day of February 2007.

13
14 S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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